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HAROLD B. WILLEY

In the Supreme Court of the United States

October Term 1955

No. 608 Misc.

JOHN P. KAMPMEYER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO FILE A PETITION FOR COMMON-LAW WRIT OF CERTIORARI

AND

PETITION FOR A COMMON-LAW WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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To the Chief Justice of the United States and the Associate Justices of the United States Supreme Court

Petitioner respectfully shows this Honorable Court as follows:

1. On December 19, 1955, an order was entered by the Court of Appeals for the Eighth Circuit, denying his petition for rehearing.

2. More than thirty days have expired from the date of entry of said order, so that review of the judgment of

the Court of Appeals for the Eighth Circuit can only be obtained by a common-law writ of certiorari.

3. Because the United States Government has filed liens against all of his properties, while determination of his tax liabilities is still pending before The Tax Court of The United States, petitioner has been deprived of the means of obtaining the services of a suitable attorney for the prosecution of this action. Not until after said thirty days had expired, and then only through the financial assistance of a friend of his family, was he able to obtain these services. See *U. S. v. Sidney A. Brodson*, ~~132~~ 136 F. Supp. ~~729~~ 158 (U. S. D. C. Wisc. 1955).

4. Because of the grievous errors committed by the courts below, coupled with a most harsh sentence of imprisonment considering his present age of sixty-five, the granting of his petition for a common-law writ of certiorari is necessary in the furtherance of justice.

Wherefore, he moves this Honorable Court for leave to file his petition for a common-law writ of certiorari to the United States Court of Appeals for the Eighth Circuit, as set forth hereinafter.

JACK R. MILLER,

Counsel for Petitioner.

PETITION FOR COMMON-LAW WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioner, John P. Kampmeyer, respectfully prays that a common-law writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above entitled case on November 22, 1955. This judgment affirmed his conviction on two counts under § 145(b) of Title 26, United States Code, following which he was fined $7,000 on each count and sentenced to prison for a term of three years on each count, the sentences to run *consecutively.*

OPINIONS BELOW

The opinion of the Court of Appeals affirming the judgment of conviction entered by the District Court is reported at 227 F. 2d 313. A copy thereof is hereunto annexed.

JURISDICTION

The judgment of the Court of Appeals was dated and entered and on November 22, 1955. A petition for rehearing was timely filed on December 7, 1955, and was denied by the Court's order, without opinion, dated and entered on December 19, 1955. Because the thirty-day time limit has expired for filing a petition for a statutory writ of certiorari under § 1254(1) of Title 28, United States Code, the petitioner's only relief is to ask this Court for a common-law writ of certiorari.

Jurisdiction of this Court is invoked under the provisions of § 1651(a) of Title 28, United States Code.

QUESTIONS PRESENTED FOR REVIEW

1. May a defendant be convicted in a "net worth" tax case where the government's net worth exhibit does not reflect a concealed cash reserve at the beginning of the prosecution period merely because the Government's chief witness presumed such reserve to be zero, and notwithstanding independent evidence, including admissions of the government's chief witness, of large amounts of currency owned or controlled by the defendant at that time?

2. Did the court below commit prejudicial error in holding that the main point in controversy was the amount of defendant's net worth on December 31, 1939, when the beginning of the prosecution period was January 1, 1947?

3. Did the court below commit prejudicial error in holding that "the defendant remained quiet at his peril" when, in the course of an investigation of his returns for the years 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, and 1950, he did not volunteer (nor was he asked for) information regarding his concealed cash reserve as of January 1, 1947—the beginning of the prosecution period selected by the government almost three years afterwards?

4. Did the court below commit prejudicial error in affirming the conviction of the defendant and refusing to grant a new trial for prejudicial error committed by the trial court in refusing to instruct the jury that if unreported income showing up during the prosecution years was earned in prior years, the defendant must be acquitted?

THE STATUTE INVOLVED

The statute under which petitioner was prosecuted reads as follows:

Sec. 145(b), 26 U. S. C.:

> "Any person * * * who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

STATEMENT OF THE CASE

Petitioner was indicted, forced to be tried by a jury, and convicted in the United States District Court for the Southern District of Iowa for violating § 145(b) of Title 26, United States Code, for the years 1947 and 1948. He was fined $7,000 on each count and, notwithstanding his age (he was sixty-five on January 6, 1956), sentenced to prison for a term of three years on each count, the sentences to run *consecutively.*

The government attempted to establish its case by the net worth method (R. 118 and p. 315 of opinion below).

The years investigated by the Internal Revenue Service were 1940 through 1950. Every cooperation was given the examining agents by the petitioner (R. 8, 45). Inasmuch as the investigation did not commence until November 8, 1951 (R. 4), the years 1940 through 1944 were open only for possible civil liability. In seeking to establish civil liability, the examining agents, as is customary in civil

net worth cases, sought to determine the petitioner's net worth as of December 31, 1939. The question of how much concealed cash reserve the petitioner had on or about this date naturally arose. The petitioner claimed an amount of about $90,000 (R. 147), which claim was ignored by the examining agents (Ex. 14 at R. 137).

In the course of the numerous conferences and interrogations incident to the investigation, during which the petitioner never refused to try to answer any of the hundreds of questions or sign written statements (R. 45), the special agent in control of the investigation never inquired of the petitioner the amount of his concealed cash reserve at any date other than December 31, 1939. When, almost three years afterwards, the years 1947 and 1948 were selected by the government for prosecution, this cash reserve at the beginning of the prosecution period (January 1, 1947) was presumed to be zero by the special agent (R. 47).

During the trial, substantial evidence was introduced through cross-examination of the government's chief witness that the petitioner possessed or controlled large amounts of concealed cash on or about the beginning of the prosecution period.

In its charge to the jury, the trial court disregarded petitioner's requested Instruction No. 7 (R. 127), which set forth a basic principle of "net worth" tax cases, and appropriate exception was taken. This instruction was especially designed to offset the court's prejudicial and misleading Instruction No. 13 (R. 119), appropriately objected to (R. 97), wherein the court directed the jury's attention to the beginning point for *civil* liability (Janu-

ary 1, 1940) rather than the beginning point for the prosecution period (January 1, 1947). In his motion to set aside the verdict of the jury, the petitioner called the trial court's attention to this error, as follows (R. 130-1):

> "18. * * * The failure to give this instruction resulted in the jury's attention being drawn to the correctness of a beginning point of December 31, 1939 instead of December 31, 1946, which was the true beginning point for the prosecution years."

REASONS FOR GRANTING THE WRIT

As to Question 1

The decision of the court below in refusing to acquit the petitioner, where the government's net worth exhibit failed to reflect any currency on hand (other than a constant check-cashing fund of $2500 and a small amount recorded on his business books) at the beginning of the prosecution period, notwithstanding independent evidence, including admissions of the government's chief witness, of large amounts of currency owned or controlled by petitioner at that time, is contrary to the rule of this Court in *Holland v. United States*, 348 U. S. 121 (1955), and is in direct conflict with the decision of the Court of Appeals for the Second Circuit in *United States v. Frank Costello*, 221 F. 2d 668 (1955).

In the *Holland* case, this Court declared:

> "We agree with petitioners that an essential condition in cases of this type is the establishment, with reasonable certainty, of an opening net worth, to serve as a starting point from which to calculate future increases in the taxpayer's assets. The importance of accuracy in this figure is immediately apparent, as the correctness of the result depends en-